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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1940

No. 470 ✓

R. P. FARNSWORTH & COMPANY, INC.,  
Petitioner,

versus

ELECTRICAL SUPPLY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT,

And

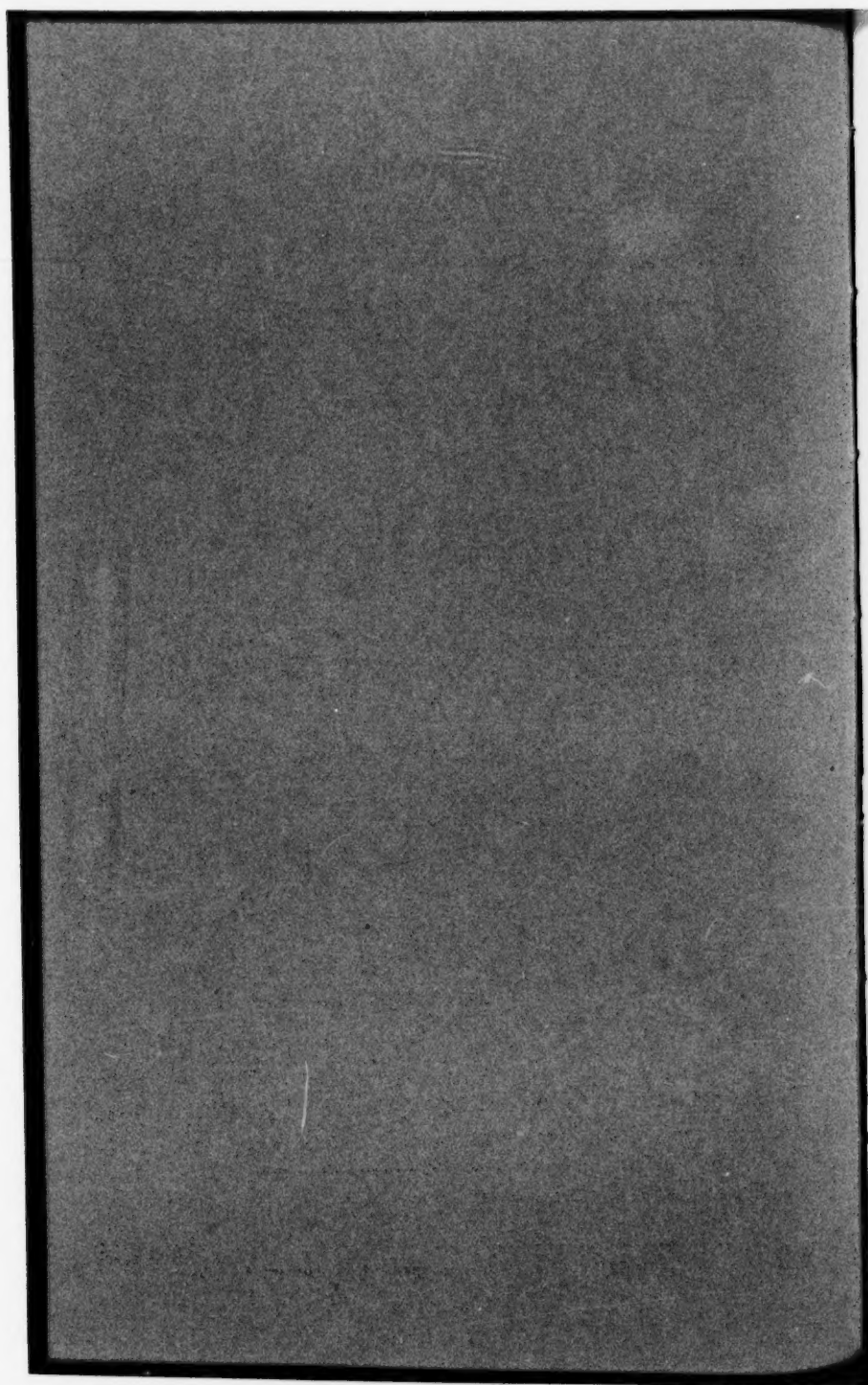
BRIEF IN SUPPORT THEREOF.

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Of Counsel.



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**No.**

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*versus*

ELECTRICAL SUPPLY COMPANY.

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**PETITION FOR WRIT OF CERTIORARI.**

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*May It Please the Court:*

The petition of R. P. Farnsworth & Company, Inc.,  
respectfully shows to your Honorable Court:

**A.**

**SUMMARY STATEMENT OF THE MATTER  
INVOLVED.**

This is a suit on a bond given under the "Hurd Act" (40 U. S. C. A., Sec. 270), which requires contractors for government construction to provide bonds conditioned upon the satisfactory performance of the construction contract and the payment of laborers and materialmen. The bond is in the prescribed form and runs to the United States as obligee.

Petitioner's contract was to construct certain buildings on the grounds of the United States Marine Hospital

in New Orleans for the contract price of \$1,178,000.00. Respondent is an unpaid materialman who furnished materials to a sub-contractor of petitioner. Petitioner paid its said sub-contractor, who did not pay the materialman, and the said materialman brought this suit against petitioner in the name of the United States.

When this suit was instituted, the Hurd Act provided:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and material shall . . . have a right of action . . . provided that . . . it . . . shall be commenced within one year after the performance and final settlement of said contract, and not later."

The present suit was brought on July 24, 1935 (R. 6), and the defense was that because final settlement had occurred on or prior to July 2, 1932, the suit was not brought within one year after final settlement and was, therefore, brought too late (R. 77-78). There is no dispute as to any fact bearing upon the date of final settlement.

The aforesaid contract was made for the United States by the Treasury Department.

By letter dated July 2, 1932, the Assistant Secretary of the Treasury, in response to a letter from R. P. Farnsworth & Company, Inc., states:

"The building was occupied prior to the expiration of your contract time on January 2, 1932. There remained for correction, after the District Engi-

neer's final report of November 14, 1932, a number of minor items which the records indicate were completed by you without loss or inconvenience to the government. There is a balance due you under this contract of \$4,332.80. You will be paid at this time on account of your said contract the sum of \$4,250.00, the balance retained (\$82.80), being considered sufficient to protect the government's interests pending final settlement of your contract." (R. 38).

By letter dated July 28th, 1934 (R. 51, 52)—which was two years after the aforequoted letter was written—the Director of Procurement reviewed and checked the record, which was then in the General Accounting Office, and recommended to the Secretary of the Treasury the payment of the \$82.80 that the government had retained, as aforesaid.

The question involved is whether "performance and final settlement" of the contract between R. P. Farnsworth & Company, Inc., and the United States took place on or prior to July 2nd, 1932, when the Assistant Secretary of the Treasury determined the balance due Farnsworth under the contract and directed the payment of all said balance except \$82.80, or on July 28th, 1934, when the Director of Procurement reviewed the record and recommended the payment of this \$82.80, which had been retained.

When the case was tried before a jury in the United States District Court for the Eastern District of Louisiana, R. P. Farnsworth & Company, Inc., through its counsel, moved the Court to direct a verdict in its favor for the reason that the suit was instituted more than one year after



complete performance and final settlement (R. 259). The District Judge overruled the motion of defendant for a directed verdict and granted the motion of plaintiff for a directed verdict (R. 217, 262). The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court (R. 281-288), but not on the point that the suit was brought too late. On this point the Circuit Court of Appeals held that it was brought within one year from the date of performance and final settlement. Circuit Judge McCord dissented from this view (R. 287).

Motion was made by petitioner for a rehearing (R. 289), and same was denied with reasons on July 2, 1940, Circuit Judge McCord dissenting (R. 295).

The Circuit Court of Appeals held, "because of error touching imputation of payment," the cause was remanded "for further proceedings not inconsistent with this opinion." The opinion and judgment limits further proceedings solely to the issue of imputation and precludes petitioner from urging on the retrial of this suit the defense that same was filed too late. The supplemental answer, second defense, (R. 79-80), shows that payment of only \$12,500.00 could be imputed, and if this judgment stand and relief is not now granted petitioner by this Court, it will be held liable for \$7500.00, representing that portion of the amount sued for which cannot be "imputed".

#### B.

#### REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Fifth Circuit held that performance and final settlement took place not on or before July 2, 1932, when the claim was ex-



amined and approved by the Administrative Department having charge of the work and the amount due under the contract by the government to Farnsworth was determined, but on July 28, 1934, when the Director of Procurement examined the file, reviewed the record and recommended the payment of the \$82.80 and that, therefore, the present suit had been commenced within one year after the performance and final settlement of the contract as required by the "Hurd Act". The Circuit Court of Appeals for the Fifth Circuit in so holding has decided an important question of federal law in a way in conflict with the applicable decisions of this Honorable Court.

2. The Circuit Court of Appeals for the Fifth Circuit erroneously held that the date of performance and final settlement was determined by the date when the Director of Procurement reviewed the record and recommended the payment of the \$82.80. In so doing, the Circuit Court of Appeals for the Fifth Circuit created a conflict with the decisions of the Courts of Appeals for the Second, Third, Fourth, Sixth, Eighth and Ninth Circuits.

### C.

#### PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9138, November Term, 1939, Electrical Supply Company v. R. P.

Farnsworth & Company, Inc., and that said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

R. F. FARNSWORTH & COMPANY, INC.

By:

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New Orleans, La.,  
Attorney for Petitioner.

